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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Respondent,

V.

RONALD SHERRILL WILKERSON,

Appellant.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER THE DISTRICT COURT ERRED AND DENIED THE DEFENDANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND FUNDAMENTAL FAIRNESS BY PRECLUDING THE DEFENDANT FROM ELICITING ON CROSS-EXAMINATION AND PRESENTING BEFORE THE JURY EXCULPATORY PORTIONS OF HIS STATEMENT WHERE THE GOVERNMENT'S WITNESS TESTIFIED WITH REGARD TO INCULPATORY PORTIONS OF THE SAME STATEMENT?

II. WHETHER THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION RESULTING IN A DENIAL OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY ALLOWING THE INTRODUCTION OF IN-COURT IDENTIFICATION BY WITNESSES WHOSE PERCEPTIONS WERE TAINTED BY A PRIOR SUGGESTIVE LINE-UP?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is published in *United States v. Wilkerson*, 84 F.3d 692 (4th Cir. 1996).

The judgment of the District Court for the Eastern District of North Carolina is not reported and is reprinted in the Appendix.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari arises from an opinion rendered by the United States Court of Appeals for the Fourth Circuit, said opinion having been issued on appeal from United States District Court. The Appellant was convicted in the District Court of two counts of bank robbery, in violation of 18 U.S.C. §§ 2113 (a) and (d), and two counts of using a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c). The U.S. District Court for the Eastern District of North Carolina had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the four count indictment, filed on August 23, 1994, alleged violations of federal law and, therefore, arose under the laws of the United States. The District Court rendered judgment on April 10, 1995.

The Appellant filed Notice of Appeal on April 20, 1995. The United States Court of Appeals for the Fourth Circuit heard this case on March 4, 1996 pursuant to its jurisdiction over appeals from final decisions of the district courts of the United States, said jurisdiction having been granted under 28 U.S.C.

§ 1291. The case was decided on May 24, 1996 and the Court of Appeals entered judgment on May 24, 1996.

The Appellant now submits a timely petition for writ of certiorari. The United States Supreme Court enjoys jurisdiction to review the judgment of the Fourth Circuit Court of Appeals pursuant to the authority granted under 28 U.S.C. § 1254(1). The Supreme Court should grant discretionary review because (1) this case presents important questions of federal law which have not been, but should be, settled by this Court and (2) this case presents questions of federal law upon which the U.S. Court of Appeals for various Circuits have rendered conflicting interpretations.

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

Rule 106 of the Federal Rules of Evidence provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Rule 611(a) of the Federal Rules of Evidence provides in pertinent part: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . ."

United States Constitution, Amendment V, provides in pertinent part: No person "shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Amendment VI, provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT OF THE CASE

On August 23, 1994, a Grand Jury for the Eastern District of North Carolina returned a four count bill of indictment alleging in Count one that on March 7, 1994 the Defendant, Ronald Sherrill Wilkerson robbed the Hope Mills Branch of Centura Bank in Fayetteville, North Carolina. Additionally, the indictment alleged that on May 13, 1994, the defendant used a firearm to take from bank employees $2,820 in U.S. currency in the possession of State Bank of Fayetteville in violation of 18 USC § 2113 (a) and (d). The indictment also charges that the defendant used and carried a firearm during and in relation to a crime of violence; that is, bank robbery, in violation of 18 USC § 924(c)(1).

The United States District Court for the Eastern District of North Carolina had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the indictment alleged violations of federal law which arose under the laws of the United States. On November 14, 1994 the Defendant entered a plea of not guilty to all charges before the Honorable Malcolm J. Howard, United States District Judge.

The jury trial of the Defendant began on January 30, 1995 in Raleigh, North Carolina before the Honorable F.T.

Dupree, Senior United States District Judge. At trial, Julie Christine Webb, an employee at Centura Bank in Hope Mills, North Carolina testified on March 7, 1995 that she saw a man in the doorway of the bank wearing a mask and carrying a bag and a gun. Ms. Webb testified that she could not identify the individual who conducted the robbery.

The only identification testimony that Ms. Webb could give was that the individual had blue eyes, was wearing a dark colored mask and carrying a dark colored automatic gun, and that he was not very tall. This person told customers "to get down on the floor, that this is a robbery." The robber walked to Ms. Webb's window and demanded money. Ms. Webb told him that she did not have her keys. While Ms. Webb retrieved her keys, the individual gave the bag to Cynthia Barker and said "you, fill it up." Ms. Barker took the bag and began to put money in it. After Ms. Webb returned, Ms. Barker handed the bag to her. Ms. Webb then put money from her drawer into the bag. The individual told her that he only wanted large bills. She put some money in it and he said, "is that it"? Ms. Barker answered affirmatively, and the individual turned and started to leave. The individual exited toward the right of the building, in the direction of the automatic teller machine. Ms. Barker followed and locked both doors. Ms. Barker saw the individual take off the mask before he got in the car. Ms. Barker described the robber as having dirty blonde hair.

Steven Daniels, who was in a vehicle blocking the getaway car, told Agent Parker that the robber had reddish hair which was neck length. (App. p. 125, lines 3-8). The automobile was parked at the end of the building beside the automatic teller machine. Ms. Barker identified that car as a 1984 to 1986 gray or silver Camaro with a two-inch red and two-inch orange stripe

along the side of the vehicle. (App. p. 74, lines 1-3). In sharp contrast, Mr. Daniels identified the car as a grayish-silver Z-28 car. (App. p. 121, lines 15-16). None of the witnesses obtained a license plate number. During a photographic lineup, Ms. Barker told agent Parker that one of the men "looks familiar to me." (App. p. 74, lines 9-11). Mr. Daniels stated to Agent Parker that the individual that he identified in the photographic lineup had "the same style of beard and moustache as the individual who robbed [the bank]." (App. p. 138, lines 19-24).

On Thursday, June 2, 1994, the Defendant, Ronald Wilkerson, and his aunt, Vickie Brown, entered the bank to deposit two tax checks. Ms. Barker looked out in the parking lot and saw a charcoal gray Camaro.

Ms. Barker told Karen Miller, the bank's branch manager, that if she "had to describe [the bank robber], he was standing in [Ms. Webb's] window." (App. p. 108, lines 19-22). Ms. Barker and Ms. Miller walked back behind the building and Ms. Miller called the police. When Ms. Barker talked to Agent Parker on the 6th of June, 1994, she stated that Ronald Wilkerson had similar physical features as the bank robber. (App. p. 76, line 18; p. 78 line 7). However, the Camaro was not the same color as the one driven by the bank robber. (App. p. 68, lines 20-24). Barker told Agent Parker that the stripes on the getaway vehicle appeared to be higher than the stripes on the vehicle shown in the photographs. (App. p. 80, line 23; p. 81, line 3).

Karen Miller, the branch manager of the bank observed a white male standing in front of the teller counter at station number one. (App. p. 105, lines 11-14). She stated that she only saw him for approximately five seconds. (App. p. 107, lines 13-14). Even though the white male was wearing a full

head mask, she saw white skin between the long-sleeve shirt and gloves he was wearing. (App. p. 105, lines 15-19). She recalled the individual as being five foot four to five foot five, medium build. (App. p. 107, lines 18-20). The individual appeared to have both hands holding a bag over the teller counter between station number one and station number two. (App. p. 105, lines 20-24). Ms. Miller told Agent Parker in her statement that she did not observe a weapon on him. (App. p. 106, lines 4-24). Mr. Daniels, as well, did not see a gun. (App. p. 133, lines 18-20).

Mr. Pollick, a patron at Centura Bank located on Hope Mills road in Fayetteville, North Carolina, observed what appeared to be a robbery in progress. During the time that he saw the man come out of the bank and then take his mask off, he was able to observe only such features as were sufficient to lead him to conclude that the individual was a white male, of medium build, and that he had a light-colored beard that maybe was "red in color." Mr. Pollick did not have time to see the individual because he was taking his mask off and stepping into the vehicle simultaneously. Because of the angle at which he drove around the bank, he was not allowed a "great deal of time" to look at the individual. (App. p. 149, line 5; p. 151, line 14).

Mr. Pollick could not see the robber's hands nor could he see if there was a gun. Mr. Pollick described the vehicle as a sports-like car that was gray in color. (App. p. 161, line 18; p. 162, line 5). Mr. Pollick could not identify the vehicle.

John McFadyen, the branch manager of State Bank on Village Drive, saw a silver Z-28 vehicle pull into the parking lot of State Bank on May 13, 1994. The person driving the vehicle had on a gorilla type mask, was carrying a cooler in his

hand, and he had a gun in his right front pocket. (App. p. 188, line 7; p. 189, line 21). The robber wanted all big bills to be put into the cooler. On a later date, Mr. McFadyen saw a silver Z-28 at the Holiday Inn Bordeaux in Fayetteville that looked like the one the robber had been driving the day of the robbery. Mr. McFadyen walked into the lobby and saw someone who looked like the bank robber sitting in the lobby. He then went to a pay phone and called the FBI. (App. p. 212, line 5; p. 213, line 23).

Mr. McFadyen testified that he was not sure if the car was a Trans-Am like vehicle or a Z-28. (App. p. 222, lines 19-23). At trial, testimony of Mr. McFadyen indicated that only one picture in the entire line-up looked like Mr. Wilkerson. (App. p. 224, line 7). But while Mr. McFadyen stated that the person depicted in the photo looked similar to the robber, he did not positively and definitely say that the person depicted was the robber. Ironically, even though the photographic line-up was just a few days after the robbery, weeks after the robbery Mr. McFayden was "certain" that he knew Ronald Wilkerson was the robber. (App. p. 224, line 7; p. 226, line 8). Cynthia Landry, a bank teller at State Bank, saw a gray Camaro with louvers on it leaving the bank parking lot after the robbery. Ms. Landry did not see the person who robbed the bank because the person was wearing a gorilla mask. At trial, Ms. Landry could not specifically identify the car used in the robbery and she reiterated that she never saw the robber without his mask. (App. p. 243, line 9; p. 244, line 1).

At trial, the government offered portions of the Defendant's statement and testimony concerning all of the circumstances involving the stop and questioning of the defendant including the inculpatory evidence that he allegedly possessed

fruits of the crime. On cross-examination, counsel for the Defendant attempted to elicit from the testifying government agent any explanation that the Defendant may have offered said agent as to where the inculpatory evidence came from. (App. pp. 335-337). The trial court refused to allow such cross-examination and prevented the Defendant from presenting his complete statement with respect to this crucial aspect of the case.

At the conclusion of the Government's evidence, the Defendant's trial counsel informed the Court that the Defendant would not present evidence. On February 2, 1995 the Defendant was found guilty on all four counts alleged in the indictment.

The Honorable Malcolm J. Howard, United States District Judge sentenced the Defendant on April 10,1995, to sixty-three months on counts one and three of the indictment to run concurrently; to sixty months on count two of the indictment to be served consecutively to counts one and three; to two hundred and forty months on count four of the indictment to be served consecutively to counts one, two, and three. Additionally, Judge Howard sentenced the defendant to three years supervised release on each count to run concurrently with one another with special conditions being that the defendant pay $2,018 to Centura Bank and $2,720 to State Bank of Fayetteville to be paid in installments at the direction of the probation office; to support dependents while incarcerated; and to pay $200.00 special assessment. Thereafter, the Defendant timely filed Notice of Appeal.

The United States Court of Appeals for the 4th Circuit affirmed the lower court's judgment on May 24, 1996. The Appellant now submits a timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision in this case that a statement made by Defendant in response to police interrogation is hearsay and, therefore, not admissible even when sought to be introduced under the Rule of Completeness when the prosecution introduces the inculpatory portions of the writing containing the Defendant's declarations conflicts with the decisions of other Courts of Appeals. Further, the ruling which prevents a Defendant from eliciting exculpatory evidence in and from the documents or fruits of the interrogation of the Defendant violate the Fifth Amendment right to due process, the Sixth Amendment right to counsel and to confrontation and implicate such fundamental concerns as to demand review.

The admission of in-court identification without determining the reliability of the identification and whether such identification was tainted and resulted in an unconstitutional and irreparable misidentification mandates review in this Court. Either as a constitutional or supervisory rule, specific and clear guidelines for the trial courts are necessary to determine the propriety of the introduction of in-court identification as evidence.

I. THE DISTRICT COURT ERRED AND DENIED THE DEFENDANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND FUNDAMENTAL FAIRNESS BY PRECLUDING THE DEFENDANT FROM ELICITING ON CROSS-EXAMINATION AND PRESENTING BEFORE THE JURY EXCULPATORY PORTIONS OF HIS STATEMENT WHERE THE GOVERNMENT'S WITNESS TESTIFIED WITH

REGARD TO INCULPATORY PORTIONS OF THE SAME STATEMENT.

At trial, Agent Robert Parker of the Federal Bureau of Investigation presented inculpatory evidence regarding the circumstances involving an encounter with the Defendant and regarding money that was allegedly found in the vehicle driven by the Defendant and that matched bait money released during one of the bank robberies. However, the trial court refused to permit the Defendant to elicit evidence from Agent Parker regarding the Defendant's statements, made at the time such money was discovered, as to where the Defendant obtained the money. The trial court committed reversible error by excluding information substantially exculpatory of the declarant.

The trial court's decision (1) violates the Defendant's rights under the Federal Rules of Evidence; and (2) violates the Defendant's Sixth Amendment right of confrontation, his Fifth Amendment right of due process, and his Fifth Amendment fundamental fairness right to present his complete defense in a full and fair tribunal.

A. The trial court's exclusion of substantially exculpatory evidence violated the Defendant's rights under the Federal Rules of Evidence.

The Defendant should have been permitted to elicit testimony from Agent Parker regarding the source of the alleged bait money because such testimony is permitted under the Federal Rules of Evidence. Such testimony constitutes either a recorded or written statement or an oral statement. If deemed to be a recorded statement or written statement, then it is admissible under Fed.R.Evid. Rule 106. Yet, even if the court deemed such

evidence to be oral testimony, then it should be admitted through the combined operation of Fed.R.Evid. Rules 611(a) and 106. Fundamental concepts of fairness require the admission of evidence.

1. *The evidence elicited by the Defendant at trial was written, not verbal evidence, which should therefore have been admitted under Fed.R.Evid. Rule 106.*

Rule 106 of the Federal Rules of Evidence states that

> when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at the time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. Fed.R.Evid. Rule 106.

At trial, Agent Parker testified as to the circumstances and events surrounding the alleged discovery of bait money in the Defendant's car. As is customary, such testimony was not given entirely from the personal recollection of the agent. Rather, the agent either had or should have had written or recorded notes of any conversations he had with the Defendant, including the explanation that the Defendant provided for the alleged presence of bait money in the Defendant's car. Because the agent used such written or recorded notes, then Rule 106 allows the Defendant to elicit other evidence similarly recorded, including testimony as to the Defendant's explanation of where he may have obtained the bait money.

Even if the agent had recorded the inculpatory statements of the Defendant but did not record the exculpatory statements, then the Defendant should still be permitted to elicit such exculpatory statements. Any other rule would encourage law enforcement officers to selectively record evidence. A rule which favors such conduct would clearly be contrary to the purpose and intent of the Federal Rules of Evidence and the Fifth Amendment, namely the ascertainment of truth. *See* Fed.R.Evid. Rule 102.

In this case below, the Court of Appeals observed that, even if Rule 106 applied to this testimony, the Rule "would not render admissible the evidence which is otherwise inadmissible under the hearsay rules." *United States v. Wilkerson*, 84 F.3d 692,696 (4th Cir. 1996). In reaching this conclusion, however, the Court of Appeals has erroneously interpreted the rule. Such interpretation must be reversed.

While a split in authority exists among United States Circuit Courts of Appeals as to whether Rule 106 provides an independent basis for admissibility. The First Circuit has noted that "whether Rule 106 furnishes an independent ground for admissibility is an open question in this circuit. Courts elsewhere are divided." *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990). While the 6th and 9th Circuits have ruled that otherwise inadmissible evidence may not be admitted under Rule 106, *see United States v. Costner*, 684 F.2d 370 (6th Cir. 1982) and *United States v. Burreson*, 643 F.2d 1344 (9th Cir. 1981), the D.C. Circuit has held that otherwise inadmissible evidence may be admitted under Rule 106. In *United States v. Sutton*, the Court stated that

> Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court. *United States v. Sutton*, 801 F.2d 1346, 1368-1369 (D.C. Cir. 1986).

The 7th Circuit has similarly interpreted Rule 106 as being capable of rendering otherwise inadmissible evidence admissible. *See United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986).

The interpretation of the 7th Circuit and the D.C. Circuit is strongly supported by the legislative history surrounding Rule 106. According to that history, the Justice Department specifically requested that the Senate Judiciary Committee limit Rule 106 evidence to otherwise admissible evidence. However, Congress refused to satisfy the Justice Department's request. *See* James P. Gillespie, "*Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*," NOTRE DAME LAW REVIEW, vol. 62, no. 3, 382-395, 391 (Summer 1987). Congress clearly intended that otherwise inadmissible evidence be admitted under Rule 106.

2. *Even if the evidence elicited by the Defendant were deemed to be oral and not written or recorded evidence, it still should have been admitted through the combined operation of Fed.R.Evid. Rules 106 and 611*

Rule 611(a) of the Federal Rules of Evidence provides that the court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth. . . " Fed.R.Evid. Rule 611(a).

Admittedly, Rule 106 directly applies only to written or recorded statements, and not oral statements. However, at least two Circuit Courts of Appeals have ruled that Rule 611(a) has the effect of permitting the trial court to apply Rule 106 to oral statements as well.

In *United States v. Li*, the Seventh Circuit acknowledged that Rule 106 applies only to written or recorded statements. The Court that Fed.R.Evid. 611(a) grants district courts the same authority regarding oral statements which Fed.R.Evid. 106 grants regarding written and recorded statements. . . . Therefore, the rule of completeness applied to the oral statement." *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995), *citing United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993).

Similarly, the Second Circuit has employed Rule 611(a) as a gateway for the introduction of oral statements under the rule of completeness codified in Fed.R.Evid. Rule 106. In *United States v. Castro*, the Court of Appeals admitted that

> Rule 106 governs only writings. . . . However, courts historically have required a party offering testimony as to an utterance to present fairly the "substance or effect" and context of the statement. In other words, while verbal precision may be unnecessary, the testimony "should at least represent the tenor of the utterance as a

> whole, and not mere fragments of it." [Citations Omitted] Moreover, Fed.R.Evid. 611(a) empowers and obligates the district court to take account of these considerations. *United States v. Castro*, 813 F.2d 571, 576 (2nd Cir. 1987).

Rule 611(a), the Second Circuit observed, is but a more general version of Rule 106. *Id.*

This Court should follow the Second and Seventh Circuits in allowing Rule 611(a) to extend the rule of completeness codified in Rule 106. Rule 106 reflects two primary concerns: (1) the misleading impression created by taking matters out of context and (2) the inadequacy of reparatory measures when delayed until later in the trial. *See* Fed.R.Evid. 106 advisory committee's note. Given these two primary concerns, there is no rational reason why Rule 611(a) should not be interpreted so as to extend Rule 106 and permit the Defendant to elicit testimony regarding the prior exculpatory oral statements of the Defendant.

B. The trial court's exclusion of substantially exculpatory evidence violated the Defendant's Sixth amendment right of confrontation, his Fifth Amendment right of due process, and his Fifth Amendment fundamental fairness right to present his complete defense in a full and fair tribunal.

Should this Court determine that the trial court did not violate the Defendant's rights under the Federal Rules of Evidence, the Defendant should nevertheless prevail because the trial court's decision violated the Defendant's right of confrontation, his due process rights, and his right to fundamental

fairness and to a full presentation of his complete defense. These constitutional rights are substantially greater in importance than the procedural rules effecting the manner of presentation of evidence in Rules 106 and 611 of the Rules of Evidence. *See Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636, 645 (1986), *quoting Trombetta v. California*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419 (1984). Hence, notwithstanding any interpretation this Court may give to the Federal Rules of Evidence, the Defendant should have been permitted to elicit this substantially exculpatory evidence.

1. *The trial court's decision violated the Defendant's Fifth Amendment right to due process and his Fifth Amendment fundamental fairness right to present his complete defense in a full and fair tribunal.*

In *United States v. Wenzel*, 311 F.2d 164 (4th Cir. 1962), the 4th Circuit observed that where a defendant's declaration

> is admissible, the whole of what the accused said upon the subject upon the time of making confession is admissible and should be taken together, and if the prosecution fails to prove the whole statement, the accused is entitled to put into evidence, all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self serving declarations contained therewith. *Id.* at 168.

This rule of completeness, requiring introduction of an entire statement, is designed "to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence, which, viewed alone, may be misleading . . ." *United States v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977). When a defendant's statement has been admitted, such statement must be admitted completely. *Cf. United States v. Jamar*, 561 F.2d at 1108-109. *See also United States v. Prior*, 27 F.Cas (no. 16092) 624, 625 (C.C.D.C. 1937) (whole confession required). *See, generally, People v. Baker*, 23 N.Y.2d 307, 318, 296 N.Y.S.2d 745, 751 (1968).

In *United States v. Walker*, the Court of Appeals held that the rule of completeness, compelling the admission of an entire writing at the time the opposing party offers the partial evidence of it, requires, as a matter of fairness, the introduction of the entire matter. *United States v. Walker*, 652 F.2d 708, 710 (7th Cir. 1981). In *Walker*, where the government read approximately fourteen of twenty-eight pages of the defendant's testimony at the first trial into evidence at the second trial, the Court of Appeals ruled that the trial judge erred in refusing to admit the remainder of the defendant's testimony. The court reasoned that the rule of completeness is essentially a rule of fairness and that the rule is circumscribed by only two qualifications. "The portions sought to be admitted (1) must be relevant to the issues and (2) only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted." *Id, citing United States v. McCorkle*, 511 F.2d 482, 486-487 (7th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 43, 46 L.Ed.2d 43 (1975). With these qualifications in mind, the rule of completeness is violated where admission of a statement in redacted form either (1) distorts its meaning *or* (2) excludes information substantially exculpatory

of the declarant. *United States v. Alvarado*, 882 F.2d 645, 651 (2nd Cir. 1989); *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982).

In the case at bar, evidence regarding money allegedly found in a vehicle driven by the Defendant need not have been admitted. However, once such evidence has been admitted, the trial court must contemporaneously admit such other evidence -- including statements by the Defendant -- which would render such evidence complete. The alleged discovery of bait money in the Defendant's vehicle is highly inculpatory evidence. Hence, any evidence tending to explain how the Defendant acquired such money is substantially exculpatory. Furthermore, such evidence clearly explains or qualifies the prior testimony regarding the alleged discovery of the money and the surrounding circumstances. Such evidence is also clearly relevant to the inculpatory evidence. Consequently, the Defendant's due process rights and his fundamental fairness right to present a complete defense was violated.

This conclusion is particularly compelling in light of the fact that this was a criminal case in which the Defendant elected to exercise his Fifth Amendment right not to testify. In *Walker*, where the Seventh Circuit reversed in favor of the Defendant, the Court observed that

> [i]n criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus

> there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." *United States v. Walker*, 652 F.2d 708, 713 (1981).

The trial court's refusal to admit substantially exculpatory evidence resulted in substantial unfairness to the Defendant. Such decisions force a criminal defendant to choose between abandoning his Fifth Amendment right not to testify and his fundamental fairness right to present a complete defense, his due process rights, and his right of confrontation.

2. *The trial court's decision violated the Defendant's Sixth Amendment right of confrontation.*

By refusing to permit the Defendant to elicit exculpatory evidence, the trial court violated the Defendant's Sixth Amendment right of confrontation. Admittedly, such right of confrontation does not extend so far as to permit a defendant to admit, through cross-examination, all of a prior statement, irrespective of how such statement relates to the evidence presented by the testis. Indeed, only those portions of a statement which explain or pertain to or were given in connection with the statement which the government offers are required to be admitted. *Compare United States v. Ricks*, 882 F.2d 885 (4th Cir. 1989)(entire cross-examination of police officer in prior

trial was not compelled when defendant sought to introduce only a portion of it, but introductions of other portions of cross-examination testimony which explained or pertained to limited portions which the defendant sought to introduce were necessarily admissible) with *United States v. Washington*, 952 F.2d 1402 (D.C. Cir. 1991)(exclusion of co-defendant's exculpatory post arrest statement did not violate defendant's confrontation right, right to due process, or completeness rule where the defendant was able to present claimed exculpatory material through cross-examination). Here, however, in the case at bar, the Defendant sought to elicit evidence which directly pertains to, is connected with, and is explanatory of the testimony offered by Agent Parker.

The rights to cross-examination and confrontation entitle a defendant at least to show that a statement is a mere fragment, unrepresentative of the tenor of an utterance as a whole. *United States v. Alvarado*, 882 F.2d at 645. Clearly, Wilkerson, as a criminal defendant, has a right under the Sixth Amendment's Confrontation Clause to adequately cross-examine the witnesses against him. *See Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 354 (1974). This right encompasses the ability "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318. That right similarly includes the ability to test the fairness of the witness in determining whether his testimony omitted crucial exculpatory evidence and whether the witness' bias caused such an omission while simultaneously eliciting favorable evidence for the jury to consider in making its determination of guilt or innocence.

The Defendant should have been permitted to show that Agent Parker's testimony was unrepresentative of the whole

and a mere fragment. Since the Defendant elected to exercise his Fifth Amendment right not to testify on his behalf, the trial court's decision effectively eliminated the Defendant's right of confrontation.

The restrictions which the district court imposed on Wilkerson's cross-examination of the FBI agent do not fall within this latitude to impose reasonable limits. Instead, these restrictions affected the fundamental right to elicit testimony relating to the heart of the issues at trial, Wilkerson's innocence and his efforts to show the witness' bias and opinion to the contrary. *Cf.*, *Hoover v. Maryland*, 714 F.2d 301, 305, 306 (4th Cir. 1983)(reversible error to unduly restrict cross examination). Such error demands a reversal of the conviction and a new trial at which the Defendant is afforded a fair opportunity for confrontation. *See generally, United States v. Jordan*, 466 F.2d 99, 104-105 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129, 93 S.Ct. 947, 35 L.Ed.2d 262 (1972); *Simon v. United States*, 123 F.2d 80, 85 (4th Cir. 1941), *cert. denied*, 314 U.S. 694, 62 S.Ct. 412, 86 L.Ed. 555 (1941).

II. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY ALLOWING THE INTRODUCTION OF IN-COURT IDENTIFICATION

BY WITNESSES WHOSE PERCEPTIONS WERE TAINTED BY A PRIOR SUGGESTIVE LINE-UP.

A. The District Court erred and abused its discretion by allowing the introduction of in-court identification even though a prior photo identification was impermissibly suggestive and conducive to an irreparably mistaken identification.

Mistaken eyewitness identifications may have been responsible for more miscarriages of justice than any other factor. Perhaps, eyewitness identifications have resulted in more wrongful convictions than all other factors combined. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d. 1149 (1967) *quoting* P. Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1964). Concerned about the conviction of innocent people on the basis of erroneous eyewitness identifications, the courts have struggled to balance the rights of defendants threatened by the specter of incorrect eyewitness identifications with the need to prosecute cases based on disputed eyewitness identifications.

Accordingly, the due process clause protects a suspect against identification procedures which are unnecessarily suggestive and conducive to an irreparably mistaken identification. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Where, as here, the evidence elicited by the defendant shows that the identification procedure was impermissibly suggestive, the court must then analyze whether the procedure gave rise to irreparable misidentification or tainted the in court identification under the totality of the circumstances. *Manson*, 432 U.S. at 114-17, 97 S.Ct. at 2253-2254, 53 L.Ed.2d

at 154-156; *United States v. Dorta*, 783 F.2d 1179 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986). The due process inquiry is the same with respect to a photo identification and an in-court lineup: the identification must be set aside if it was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). *See also, United States v. Crews*, 445 U.S. 463, 471-473, 100 S.Ct. 1244, 1250-1251, 63 L.Ed.2d 537, 545-547 (1980) (An in-court identification is proper even though an improper earlier pretrial identification occurred so long as the former does not taint the latter.).

This Court first addressed these issues in a trio of 1967 cases, *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), and *Stovall v. Denno*, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Taken together, these three decisions establish that constitutional protections are apposite to identification procedures and when identification processes have been conducted under suggestive circumstances, in-court identification is not permissible unless the prosecution can show by clear and convincing evidence that the in-court identification derives from an "independent source or origin" rather than from the tainted earlier identification. *United States v. Wade*, 388 U.S. at 241, 87 S.Ct. at 1939, 18 L.Ed.2d at 1165.

Prior to *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), the matter of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. In *Simmons*

v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968), the Supreme Court acknowledged the constitutional implications of the unfairness and inherent dangers of misidentification in a photographic line-up and in-court identifications based upon such inherently dangerous procedures. Although the Court upheld identification without a lineup and through photographs observed prior to trial for the purpose of witnesses establishing identity, the Court explained its holding as requiring particular scrutiny to prevent constitutional deprivations. The Court reasoned:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very

> substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno*, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 18 L.Ed.2d 1199, and with decisions of other courts on the question of identification by photograph.

Id.

In *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed 2d 619 (1973), six years after *Wade*, the court ruled that there was no right to counsel at any photographic identification procedure. The court reasoned, in part, that counsel was not needed because a photographic line-up can be reconstituted and analyzed at trial for suggestivity and bias. The court also reasoned that since the accused is not present at a photo line-up, assistance of counsel is less relevant since the defendant cannot be misled or overpowered by the government.

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 619 (1973), the Supreme Court again discussed the admissibility of eyewitness identification obtained under suggestive circumstances. The court instructed that the correct analysis is whether under the totality of the circumstances the identification was reliable, even though the confrontation procedure was suggestive. The court listed five factors that should be taken into account in evaluating the reliability of an identification: (1) the witnesses' opportunity to view the criminal at the time of the crime; (2) the length of time between the crime and the identification; (3) the level of certainty demonstrated by the witness at the identification; (4) the accuracy of the witness' prior

description of the criminal; and (5) the witness' degree of attention during the crime. *Id.* at 199.

In the present case the factors demonstrating irreparable misidentification were present. None of the witnesses were able to give an adequate description of the robber, whom they had only a brief and limited opportunity to view. Shortly after the robbery none of the witnesses could identify the individual in the photographic line up positively but could only state that one of the individuals "looked familiar" or had the same style facial hair or that one photograph looked similar to the robber. Yet, only one photograph in the distinctly limited and suggestive array was similar to the descriptions given at or near the time of the robbery. Indeed, the array itself suggested only one "similarly appearing individual," the Defendant. Despite this suggestivity, many witnesses were still uncertain of identification near the time of the robbery. But because of this suggestivity, one of these witnesses -- though uncertain of identification near the time of the robbery -- later became "certain" that Ronald Wilkerson was the robber. The witnesses who admitted that they were nervous and had difficulty in viewing the robber during the crime, remained uncertain[1] and hampered by their general and inaccurate descriptions of the offender. As a result of the danger of such misidentification, Wilkerson was mistaken for the offender and, yet, the Court essentially ignored these inherent dangers in the photographic identification.

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[1] Their uncertainty is apparent from the fact that no arrest of the defendant was made even though they had "identified" the robber.

In contrast to the decision below, the Fourth Circuit has recognized the dangers inherent in the identification process, noting in *Smith v. Paderick*, 519 F.2d 70, 75 (4th Cir.), *cert. denied*, 423 U.S. 935 (1975), that:

> Identification testimony is the most dangerous evidence known to the law. That is true because it is easier to deceive ourselves than others: pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit.

Id. (Footnote omitted). *See, e.g., United States v. Wilcox*, 507 F.2d 364, 369 (4th Cir. 1974), *cert. denied*, 420 U.S. 979 (1978).

Both the composition of the array and use of the pictures deprived the Defendant-appellant of his Fifth and Sixth Amendment rights. The weak in court identifications demonstrate the unfairness of the photographic depictions which included only one photograph which had "any similarity" to the person described as being the perpetrator of the robberies. The array itself suggested the response and the identification which the Government agents sought. As a result the defendant was unduly prejudiced and his conviction resulted.

B. The trial court erred by allowing the introduction of in-court identification without first holding an evidentiary hearing to determine whether such evidence was admissible.

The United States Supreme Court has previously held that due process does not *per se* require a hearing outside the presence of the jury whenever a defendant contends that a witness' identification of him was arrived at improperly. *Watkins v. Sowders*, 449 U.S. 341, 66 L.Ed 2d 549, 101 S.Ct. 654 (1981). However, the *Watkins* ruling still holds open the possibility that such a hearing may be constitutionally required in some cases.

> A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable. In some circumstances, not presented here, such a determination may be constitutionally necessary.

Id.; *See also United States v. Mills*, 853 F.3d 672, 675 (4th Cir. 1996); *United States v. Mills*, 704 F.2d 1553, 1563 (11th Cir. 1983).

This Court has yet to specify the circumstances under which such a determination may be constitutionally necessary. The Eleventh Circuit has held that such a determination may be constitutionally necessary when the defendant has alleged unusual, special, out of the ordinary, or particularly prejudicial circumstances. *Id.* at 1564; *see also Holifield v. Davis*, 662 F.2d 710, 711 (11th Cir. 1981).

The Petitioner, here, urges the Court to establish clear guidelines for determining the particular circumstances under which an evidentiary hearing is constitutionally necessary. The Appellant proposes that a judicial determination outside the presence of the jury should be made whenever the defendant has made a *prima facie* showing that the identification evidence at issue was tainted by identification procedures which were

unnecessarily suggestive and conducive to an irreparably mistaken identification. Since, in the case at bar, the photographic array included only one individual who was even remotely similar in appearance to the Defendant; and further, since witnesses who earlier were unable to positively identify the Defendant did so identify the Defendant at trial (contrary to the expectation that one's memory fades with time); the Defendant would have succeeded in making the requisite *prima facie* showing.

This Court has recognized that identification evidence is highly unreliable. *United States v. Wade*, 388 U.S. at 228, 87 S.Ct. at 1933, 18 L. Ed. 2d at 1158. It has stated that a hearing, out of the presence of the jury, is often advisable and may under some circumstances be constitutionally necessary. *Watkins v. Sowders*, 449 U.S. at 349, 101 S.Ct. at 659, 66 L.Ed. 2d at 556 (1981). This Court should not allow the lower courts to continue dangling in the winds of ambiguity. This Court's refusal to provide clear guidelines comes at the cost of both judicial efficiency and the freedom of innocent defendants.

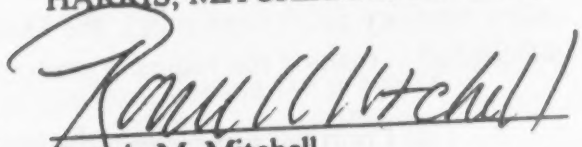
CONCLUSION

This case involves important legal issues which have been addressed in conflicting ways by various United States Circuit Courts. It further involves issues of constitutional magnitude which the lower courts will undoubtedly often be confronted in the future. There are, therefore, significant and important reasons for granting review on writ of certiorari.

This court should grant discretionary review, reverse the Defendant's conviction, and remand for a new trial.

This 12th day of November, 1996.

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD SHERRILL WILKERSON,
Defendant-Appellant.

No. 95-5321

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville.
Malcolm J. Howard, District Judge;
Franklin T. Dupree, Jr., Senior District Judge.
(CR-94-58-H)

Argued: March 4, 1996

Decided: May 24, 1996

Before LUTTIG, Circuit Judge, CHAPMAN, Senior Circuit Judge,
and CLARKE, Senior United States District Judge
for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Senior Judge Clarke wrote the opinion, in which Judge Luttig and Senior Judge Chapman joined.

COUNSEL

ARGUED: Ronnie Monroe Mitchell, HARRIS, MITCHELL & HANCOX, Fayetteville, North Carolina, for Appellant. David J. Cortes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. ON BRIEF: Janice McKenzie Cole, United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION

CLARKE, Senior District Judge:

Ronald Sherrill Wilkerson was convicted by jury of two counts of bank robbery, in violation of 18 U.S.C. §§ 2113 (a) and (d), and two counts of using a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c). In this appeal, he challenges (1) the in-court eyewitness identifications which he claims were tainted by prior suggestive photographic lineups and (2) the trial judge's exclusion of exculpatory hearsay statements. Because the admission of the eyewitnesses' in-court identifications was not plainly erroneous and because the trial judge did not abuse his discretion in excluding the hearsay statements, we affirm.

I

When the sufficiency of evidence to support a conviction is challenged, the relevant facts are viewed in the light most favorable to the government. Accordingly, the facts are as follows.

On March 7, 1994, Wilkerson entered the Centura Bank in Fayetteville, North Carolina, wearing a mask and carrying a satchel in one hand and an automatic pistol in the other. He told one customer to "get down on the floor, this is a robbery." He then approached the head teller, Julie Webb, pointed the gun at her, and handed the satchel over with instructions to fill it with large bills. She told him that she did not have the keys to her teller station, whereupon Wilkerson told her to get them. While Webb went to retrieve the keys, Wilkerson gave the satchel to another teller, Cynthia Barker, saying "fill it up." Barker complied with Wilkerson's request, placing approximately $750 in the bag. Upon her return, Webb deposited another $1500 in the satchel. Wilkerson then walked out the front door and headed towards his waiting car. Barker followed him to the door in order to lock the bank. As she reached the door, she saw Wilkerson take off his mask. He turned and looked at her, thus giving her the opportunity to see both the front and side of his face.

Two customers in the drive-through teller lane saw the robbery and also saw Wilkerson without his mask on. One of these eyewitnesses,

Steven Daniels, pulled in front of the getaway car and saw Wilkerson's face, making eye contact with Wilkerson a number of times. The other eyewitness, Carl Pollick, also saw Wilkerson remove his mask. Both Pollick and Daniels chased Wilkerson's car. They described it as a gray or silver Camaro-like sports car with grates on the back window. Daniels only chased Wilkerson for a short time, but Pollick continued the chase, attempting to get a license plate number. The license plate had been flipped over, however. After Pollick lost sight of the car, he remained in the neighborhood, searching for it. Within three to five minutes, he spotted a car which he believed to be the getaway car. This time, the license plate was visible, and, when Wilkerson stopped at a gas station, Pollick wrote down the plate number.

Based upon the license number, the police were able to identify Wilkerson as the owner of the car, but were unable to apprehend Wilkerson. The police did, however, show Daniels and Barker a photographic lineup containing Wilkerson's photo on March 21, 1994. Although neither of them positively identified Wilkerson, Barker stated that he looked familiar to her and Daniels picked Wilkerson's photo as the person who looked like the bank robber. There is no evidence in the record concerning the other pictures in the lineup.

Wilkerson was still at large on May 13, 1994. On that day, the Branch Manager of the State Bank of Fayetteville, John McFayden, saw Wilkerson drive up to the bank wearing a gorilla mask. Wilkerson walked into the bank carrying a Coleman cooler, a pistol visible in his front pocket. He demanded money in large bills; two tellers, Tammy Laughner and Cynthia Landry, handed over money from their cash drawers. Some of the money Landry gave Wilkerson was bait money whose serial numbers had been recorded. Upon returning to his car, Wilkerson removed his mask and looked back at McFayden and Laughner. On May 17, 1994, four days later, both McFayden and Laughner looked at the photographic lineup and stated that Wilkerson's photo closely resembled the robber.

On May 24, 1994, two FBI agents spotted Wilkerson, and after a slow-speed pursuit, began questioning him about his whereabouts on the dates of the two robberies. Wilkerson provided an alibi for the time of each robbery; however, these were later discredited. The

agents requested and received Wilkerson's permission to search the car. Under the driver's seat, they found a black plastic case containing 20 five dollar bills. The agents randomly selected some of these bills and found that the serial numbers matched the bait money numbers provided by the State Bank of Fayetteville.[1] Wilkerson was not arrested at this time.

On June 2, 1994, Wilkerson and his aunt went to the Centura Bank to make a deposit. Barker became upset when she saw Wilkerson, believing him to be the bank robber, and called the police. Wilkerson, however, was not arrested until August 26, 1994, following a call to the FBI from McFayden, who had spotted and identified Wilkerson in the lobby of a Holiday Inn.

At trial, Barker and Daniels identified Wilkerson in court as the individual who robbed the Centura Bank on March 7, 1994. McFayden and Laughner also made in-court identifications. Other evidence presented at trial included Wilkerson's possession of the bait money, Pollick's statement about the license plate number, the discrediting of Wilkerson's alibis, and Wilkerson's girlfriend's testimony concerning a cooler of money he had shown her the evening of the second robbery. In addition, FBI agent Parker testified regarding the search of Wilkerson's car and the discovery of the cash under the car seat. On cross-examination, the trial judge refused to allow Parker to be questioned about the statements Wilkerson had made after the search of his car implicating his cousin.

II

Wilkerson first contends that the trial court erred by allowing the eyewitnesses to identify Wilkerson at trial as the robber of the Centura Bank and the State Bank of Fayetteville. He claims that this violated his due process rights because the in-court identifications were tainted by the prior suggestive photographic lineups.

A motion to suppress evidence should be raised prior to trial. Fed R. Crim. P. 12(b)(3). Wilkerson failed to do so. Furthermore,

[1]Later, a comprehensive comparison revealed that 18 of the 20 bills matched the bait money inventory list.

although Wilkerson's attorney did object to the introduction of the prior photographic lineup identifications at trial, he did not do so on the basis of the suggestiveness of the lineup. Instead, he objected to the eyewitnesses testifying about the photographic lineups at trial because they had not positively identified Wilkerson at the time of the lineups.[2] Because Wilkerson's objection to the admission of the photographic lineup evidence on appeal is not the same as his objection at trial, the standard of review is one of plain error. Fed. R. Crim. P. 52(b); *see also United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995) (plain error standard applies where appellant did not object to statements made at trial); *United States v. Brewer*, 1 F.3d 1430, 1434 (4th Cir. 1993) (plain error standard used "where counsel fails to adequately present and preserve an objection on the record"). We find no error in the admission of the in-court identifications.

The Supreme Court has outlined a two-step analysis for determining whether identification testimony is admissible. First, the defendant must establish that the photographic lineup procedure was impermissibly suggestive. *Manson v. Braithwaite*, 432 U.S. 98, 110 (1977); *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968). Second, even if the procedure was suggestive, the in-court identification is valid if it was reliable. *Braithwaite*, 432 U.S. at 114; *Biggers*, 409 U.S. at 199; *Willis v. Garrison*, 624 F.2d 491, 493 (4th Cir. 1980). The factors the court may consider in measuring reliability include: (1) the witness' opportunity to view the perpetrator at the time of the crime; (2) the witness' degree of attention at the time of the offense; (3) the accuracy of the witness' prior description of the perpetrator; (4) the witness' level of certainty when identifying the defendant as the perpetrator at the time of the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. These factors are weighed against the "corrupting effect of the suggestive identification itself." *Braithwaite*, 432 U.S. at 114. Courts may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification. *See, e.g., United States v Lau*, 828 F.2d 871, 875 (1st Cir. 1987) (court relies on fact that one defendant had license

[2]The trial judge instructed counsel that inconsistent statements went to the probative value of the testimony and should be discredited by counsel through cross-examination.

to fly the plane in question, another was nearby the site where the transaction occurred, and the witness used the defendants' correct names when first describing them to the authorities, to support the reliability of the witness' identification of the defendants), *cert. denied*, 486 U.S. 1005 (1988); *United States v. DiTommaso*, 817 F.2d 201, 214 n.17 (2d Cir. 1987) (even if the identification was unreliable, error was harmless where evidence as a whole was overwhelming); *United States v. Bell*, 812 F.2d 188, 193 (5th Cir. 1987) (identification may be reliable in the context of all the circumstances and evidence).

In this case, Wilkerson has failed to establish that the photographic lineup was impermissibly suggestive. The lineup was not made a part of the appellate record, the district court has not ruled on the issue, and the only evidence of suggestibility is Wilkerson's bare assertion that the other photos did not look like the perpetrator as described by the witnesses.[3] Consequently, Wilkerson fails the first part of the analysis.

Furthermore, assuming *arguendo* that the photographic array was impermissibly suggestive, Wilkerson's argument would still fail because the in-court identifications were reliable. All the witnesses saw Wilkerson's face in broad daylight while their full attention was focused on him. The witnesses' prior descriptions were fairly accurate. The witnesses who identified Wilkerson at trial were positive of their in-court identification. In addition, it is unlikely that the photos had a corrupting effect on the in-court identifications. None of the witnesses positively identified Wilkerson from the photographic lineup, perhaps due to the poor quality of the photos as described by both parties. There was no evidence that the photos were shown repeatedly to the witnesses or that the police emphasized Wilkerson's photo. *See Simmons*, 390 U.S. at 383 (danger of misidentification is heightened if defendant's picture is emphasized or recurs in lineup). Under these circumstances, we cannot say that "there is a substantial likelihood of irreparable misidentification." *Id.* at 384. Finally, the

[3]During oral argument, Wilkerson's attorney claimed that the photos were of poor quality and that only one of the photos, the one of Wilkerson, resembled the perpetrator as described by the witnesses. The government agreed that the photos were of poor quality, but stated that the individuals in the photos were similar in appearance.

fact that two of the witnesses, Barker and McFayden, upon observing Wilkerson in public, were so certain that he was the bank robber that they called the authorities, also lends substantial support to the reliability of the identifications. Accordingly, because Wilkerson has failed to show both that the photographic lineup was impermissibly suggestive and that the witnesses' testimony was unreliable, Wilkerson's due process rights were not violated by the in-court identifications.

III

Wilkerson also alleges that the district court erred in prohibiting him from eliciting, on cross-examination of Agent Parker, exculpatory statements he had made explaining how he had acquired the bait money. Wilkerson claims that the trial judge should have allowed in this testimony under the rule of completeness. A trial judge's evidentiary decisions are reviewed for abuse of discretion. *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994).

The common-law doctrine of completeness has been partially codified in Rule 106 of the Federal Rules of Evidence.[4] *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988). The rule applies only to writings or recorded statements, not to conversations. Fed. R. Evid. 106, advisory committee notes; *United States v. Bigelow*, 914 F.2d 966, 972 (7th Cir. 1990), *cert. denied*, 498 U.S. 1121 (1991). Thus, Wilkerson's reliance on the rule is misplaced. Furthermore, when the rule does apply, its purpose is to prevent a party from misleading the jury by allowing into the record relevant portions of the excluded testimony which clarify or explain the part already received. *United States v. Ricks*, 882 F.2d 885, 893 (4th Cir. 1989), *cert. denied*, 493

[4]The rule provides that

> [w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106.

U.S. 1047 (1990); *Merrick v. Mercantile-Safe Deposit & Trust Co.*, 855 F.2d 1095, 1103-04 (4th Cir. 1988); *United States v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977). In this case, during direct examination Agent Parker testified that the agents found a black case containing some of the bait money while searching Wilkerson's car. No other testimony about any portions of a conversation between the agents and Wilkerson regarding that particular cache of money was introduced. Thus, the rule of completeness, if it applied to oral conversations, would not have applied here where there was no partially-introduced conversation that needed clarification or explanation.

The evidentiary rules which properly govern the admissibility of Wilkerson's exculpatory statements are contained within the hearsay rule and the exceptions thereto. *See* Fed. R. Evid. 801, 802, 803, and 804. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Admissions by a party-opponent are not considered hearsay and therefore can be admitted against that party. Fed. R. Evid. 801(d)(2). Thus, during direct examination, the government could have introduced inculpatory statements made by Wilkerson. The rules do not, however, provide an exception for self-serving, exculpatory statements made by a party which are being sought for admission by that same party. *See* Fed. R. Evid. 803-804. Moreover, even if, as Wilkerson claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules. *See United States v. Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987) (neither Rule 106 or Rule 611 authorizes a court to admit unrelated hearsay when that hearsay does not fall within one of the exceptions to the hearsay rule). Consequently, because the exculpatory statement in question here was pure hearsay and no exception enumerated in the rules permit its introduction, the trial judge did not abuse his discretion in prohibiting its admission.

IV

Wilkerson's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel has requested this Court to review the record for any basis for appeal that he may have over-

looked. In accordance with *Anders*, we have examined the record and have found no basis for appeal.

V

Finding no error in either the admission of the in-court identifications or the trial court's exclusion of exculpatory hearsay statements, Wilkerson's conviction is

AFFIRMED.